BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Oklahoma has not been officially reported. It was filed December 21, 1943 (R. 124-130). No petition for rehearing was filed.

II.

Jurisdiction.

1. The ground on which the jurisdiction of the Supreme Court of the United States is invoked is that provided by Section 237c of the Judicial Code, as amended by Act of January 31, 1928, c. 14, Sec. 1, (45 Stat. 54); Tit. 28, Sec. 344b, U. S. C., providing for the issuance of a writ of certiorari by the Supreme Court of the United States to review a final judgment rendered by the highest court of the state where an immunity is specially set up and claimed under the Constitution and statutes of the United States.

2. That there is drawn into question the validity of a statute of the State of Oklahoma, to-wit, that part of Tit. 82, Sec. 861, O. S. 1941, set forth in the opinion of the Supreme Court of the State of Oklahoma (R. 127) as imposing upon petitioner the liability adjudged against it in this cause contrary to the immunity from such liability as established under the Constitution and laws of the United States by decisions of this Court.

3. The authority of the District Engineer to direct the acts of petitioner claimed to have resulted in the liability adjudged by the Supreme Court of the State of Oklahoma flows from the Commerce Clause of the Constitution of

the United States. Provisions of the Flood Control Acts set forth in the "Statement of Points Relied on by Petitioner," stated in the petition, the Federal license issued to petitioner by the Federal Power Commission, and the acts performed by petitioner thereunder constituted a performance by it of a Federal function, because of which its liability, if any, should be determined by the Constitution and laws of the United States and the decisions of this Court.

4. The provisions of the Federal Power Act and the provisions of petitioner's license do not operate to destroy the immunity from liability claimed by petitioner.

III.

Statement of Case.

The nature of the case, the manner in which the Federal question was raised, and the pertinent facts are set forth in the "Summary Statement of the Matter Involved" appearing in the petition, and are adopted by reference as a part of this brief.

IV.

Specification of Errors.

1. The Supreme Court of Oklahoma erred in refusing to hold that petitioner, as an instrumentality of the Government of the United States in the acts complained of, is immune from liability to respondent.

2. The Supreme Court of Oklahoma erred in holding that by the acceptance of its Federal Power license, conditioned as it was regarding flood control operations and the building of petitioner's dam, constituted a wrong for which petitioner is liable to respondent.

3. The Supreme Court of Oklahoma erred in holding that petitioner was liable under the provisions of Tit. 83, Sec. 862, O. S. 1941, notwithstanding that at the time complained of the petitioner was engaged in performing acts directed by the District Engineer for the control of floods.

4. The Supreme Court of Oklahoma erroneously decided that in complying with the provisions of its Federal Power license regarding the control of floods under the direction of the District Engineer petitioner committed the wrong complained of.

5. The Supreme Court of Oklahoma erred in affirming the judgment complained of, for petitioner's immunity from liability was specially set up and sufficed to show that the judgment complained of was erroneous.

Summary of Argument.

1. The power of Congress to provide for the control of floods on non-navigable tributaries of navigable waters of the United States springs from Article 1, Sec. 8, of the Constitution of the United States. *Oklahoma, ex rel. Phillips,* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500. Jurisdiction to direct Federal activities in the control of floods on navigable streams and their tributaries is conferred upon the Secretary of War by the Act of June 22, 1936, c. 688, Sec. 2, 49 Stat. 1570; Tit. 33, Sec. 701b U. S. C. The Secretary of War was authorized to utilize the services of petitioner as a public agency under the provisions of the Act of June 28, 1938, c. 795, Sec. 5, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C., as follows:

> "In carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570), as amended and supplemented, the Secretary of War and the Secretary of Agriculture are hereby authorized to cooperate with institutions, organizations, and individuals, and to

utilize the services of Federal, State, and other public agencies," etc.

By Article 13 (R. 37) of petitioner's Federal Power license the space in petitioner's reservoir above elevation 745 was reserved expressly for the control of floods, and direction of the operation of the flood control pool was vested in the Secretary of War or his authorized representative. Authority to condition the license in this manner was possessed by the Federal Power Commission under the provisions of the Federal Power Act, particularly set out in the "Statement of Points Relied Upon by Petitioner" in the petition. In complying with the directions of the District Engineer in holding the waters of the reservoir to elevation 749.7 at the dam gauge petitioner acted as the agent of the United States and cannot be held liable for the consequences of obedience to these authorized directions. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21, 84 L. Ed. 554, 556; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541; *Den* v. *Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 283, 15 L. Ed. 372, 377; *Lamar* v. *Browne*, 92 U. S. 137, 199, 23 L. Ed. 650, 655; *The Habana*, 189 U. S. 453, 465, 47 L. Ed. 901, 903; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511; *Chattanooga & Tennessee Power Co.* v. *Lawson*, 139 Tenn. 354, 201 S. W. 165, 168, 169, 170; *Evans* v. *Massman Construction Co.*, 243 Mo. 632, 122 S. W. (2) 924, 930, 931; *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604.

The District Engineer (R. 106, 109) and the Federal Power Commission interpreted Article 13 of petitioner's license (R. 100) as requiring petitioner to hold the waters of its reservoir up to elevation 750 at the dam gauge. The consequent "back-water curve" produced in the neighborhood of the respondent's property caused a percolation

of the reservoir waters into the basement of its school building which gave rise to the claim sued on. Petitioner is not liable for any error in judgment of the District Engineer in directing its acts in the interest of flood control after the reservoir rose above elevation 745. *Erskine* v. *Holnback*, 14 Wall. (U. S.) 613, 617, 20 L. Ed. 745, 747; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309, 35 L. Ed. 1018, 1024; *Haffin* v. *Mason*, 15 Wall. (U. S.) 671, 675, 21 L. Ed. 196, 198; *Harding* v. *Woodcock*, 137 U. S. 43, 46, 47, 34 L. Ed. 580, 581; *Matthews* v. *Densmore*, 109 U. S. 216, 220, 27 L. Ed. 912, 913, 914; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381, 77 L. Ed. 1265, 1271.

2. The acceptance by petitioner of the Federal Power license, conditioned as it was regarding the control of floods and operations therefor, and the building of the dam as authorized thereby, did not constitute a wrong on petitioner's part for which it can be held liable to the respondent herein. The Federal Power Commission had jurisdiction to grant the license (*Grand River Dam Authority* v. *Going*, 29 F. S. 316, 325), because of its finding that the building of the project "will affect the interests of interstate commerce" (R. 18). Act of June 10, 1920, c. 285, Sec. 23, 41 Stat. 1075; Act of August 26, 1935, c. 687, Tit. II, Sec. 210, 49 Stat. 846; Tit. 16, Sec. 817, U. S. C.

Under the Act of its creation petitioner was authorized to make contracts necessary or convenient to the exercise of its powers, rights, privileges and functions. Tit. 82, Sec. 862n, O. S. 1941. The license was therefore lawfully accepted and did not constitute a ground for the imposition of liability on petitioner for the performance of acts required of it by the District Engineer in controlling floods.

3. The provisions of Tit. 82, Sec. 862, O. S. 1941, providing that petitioner should be liable for all damage caused by it, its agents, servants and employees, in creating, con-

structing, maintaining or operating its project to any person whose property was damaged, cannot control the question of petitioner's liability to respondent arising out of acts performed by petitioner in operating its reservoir for the purpose of flood control under instructions of the District Engineer as a representative of the Secretary of War. *State of Arizona* v. *State of California*, 283 U. S. 423, 451, 75 L. Ed. 1154, 1163, 1164; *Johnson* v. *State of Maryland*, 254 U. S. 51, 56, 57, 65 L. Ed. 126, 128, 129; *State of Ohio* v. *Thomas*, 173 U. S. 276, 283, 43 L. Ed. 699, 701; *Cunningham* v. *Neagle*, 135 U. S. 1, 61, 62, 34 L. Ed. 55, 70, 71; *State of Tennessee* v. *Davis*, 100 U. S. 257, 263, 25 L. Ed. 648, 650; *Hunt* v. *United States*, 278 U. S. 96, 100, 73 L. Ed. 200, 201; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150, 82 L. Ed. 155, 166, 167. That petitioner was a state agency does not alter its immunity under Federal law. *Osborne* v. *The Bank of the United States*, 9 Wheat. (U. S.) 738, 762, 763, 6 L. Ed. 204, 234. Petitioner could have avoided liability in this case only by refusing to obey the directions of the District Engineer in operating its reservoir for flood control purposes, which, if violative of the terms of its Federal Power license, would have subjected the latter to cancellation under the provisions of Section 26 of the Federal Power Act (Act June 10, 1920, c. 285, Sec. 26, 41 Stat. 1075, Tit. 16, Sec. 820 U. S. C.) Under these circumstances it was petitioner's duty to yield to the directions of the District Engineer as an authorized officer of the United States.

4. By complying with the provisions of its license and in performing the directions of the District Engineer for the control of floods petitioner committed no actionable wrong. *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

5. The provisions of the Federal Power Act (Act of June 10, 1920, c. 285, Sec. 10c, 41 Stat. 1068; Act of August 26,

1935, c. 687, Tit. II, Sec. 203c, 49 Stat. 842; Tit. 16, Sec. 803c), and corresponding provisions of Article 17 of petitioner's license (R. 38) providing that the licensee shall be liable for all damages occasioned to the property of others by construction, maintenance or operation of the project did not create a liability in petitioner for having obeyed the directions of the District Engineer. *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604; *Louisville Hydro-Electric Co.* v. *Coburn*, 270 Ky. 631, 110 S. W. (2) 445, 448; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511; *Corrigan Transportation Co.* v. *Sanitary District*, 125 F. 611, 613; Id. C. C. A. 7, 137 F. 851, 855. The provisions of the Act and of the license referred to are not calculated to create a new liability nor to make a licensee liable for the taking of property or for consequential damages thereto when taken or damaged at the direction of the United States. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21, 23, 84 L. Ed. 557, 558; *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

ARGUMENT.

Proposition I.

In carrying out the directions of the District Engineer for controlling floods after the reservoir reached elevation 745, petitioner acted as an instrument of the United States and is not liable for the injury sustained by respondent.

In carrying out the District Engineer's instructions, at the time in question, petitioner was engaged in the performance of a duty imposed on it by its Federal license in the furtherance of a National policy of flood control. The District Engineer was competent to give those directions, for he was authorized to that end by the Secretary of War (R. 104). The latter was authorized "to utilize the serv-

ices" of petitioner as a "public agency" (Act June 28, 1938, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C.), in carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570; Tit. 33, c. 15, U. S. C.), and was further thereunto authorized by Articles 13 and 14 of petitioner's license (R. 37) which was granted and accepted under the Federal Power Act (49 Stat. 863, et seq.; Tit. 16, c. 12, U. S. C.), in accordance with the particular provisions thereof previously noticed in the petition. That Grand River is non-navigable (*United States* v. *Elliott*, (C. C. A. 10) 131 F. (2) 720, 723; *Grand River Dam Authority* v. *Going*, 29 F. S. 316, 321) was no bar to Federal jurisdiction for the Commission found that "the construction and operation of said project in the manner proposed by the declarant will affect the interests of interstate commerce" (R. 18). The fact that the building of petitioner's project "will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is a tributary" (R. 18), fully justified Federal activity in controlling floods through its means. *Oklahoma, ex rel. Phillips,* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500.

Petitioner was acting under the authority of laws of the United States and in obedience to orders within the jurisdiction of the District Engineer to give. The reservoir had risen beyond the maximum elevation (745) to which petitioner might control its operation, and beyond the minimum stage at which the District Engineer should take over (R. 37). Petitioner had no alternative but to carry out the directions which the latter gave. Its hydraulic engineer drew the District Engineer's attention to the fact that holding water to elevation 749.7 at the dam would produce the back-water curve of which complaint is herein made, but was told to carry out the instructions given (R. 123). While it could be argued that Article 13 of the license did not

require the holding of water to any point in the reservoir above elevation 750 and that, therefore, the District Engineer ought not have ordered it and petitioner ought not to have obeyed the order, the District Engineer appears to have construed the license as applying to elevation 750 at the dam gauge, notwithstanding the probability of a back-water curve at the head of the lake, and the Federal Power Commission assented to this interpretation (R. 99-100). At any rate, the War Department did not repudiate the District Engineer's interpretation of the license in this respect (R. 97-98). Usually, an interpretation placed upon a statute or regulation by the department of Government charged with its administration is persuasive as to its meaning. *Blanset* v. *Cardin*, 256 U. S. 319, 326, 65 L. Ed. 950, 954. Public officers are generally presumed to have acted within the scope of their authority (*United States* v. *Chemical Foundation*, (D. C.) 300, 326; 65 C. J. 1277) and to have properly performed the duties enjoined upon them by law. *Ross* v. *Stewart*, 227 U. S. 530, 535, 57 L. Ed. 626, 629; *Nofire* v. *United States*, 164 U. S. 657, 660, 41 L. Ed. 588, 590. The instructions of the District Engineer were not beyond his authority to give.

It has been quite uniformly held by this Court that an agent or officer of the United States, in carrying out directions given him by a superior officer or agent within the latter's jurisdiction to give, cannot be pursued, but is clothed with immunity from liability. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21, 84 L. Ed. 554, 556; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541; *Den* v. *Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 283, 15 L. Ed. 372, 377; *Lamar* v. *Browne*, 92 U. S. 137, 199, 23 L. Ed. 650, 655; *The Habana*, 189 U. S. 453, 465, 47 L. Ed. 901, 903. In the State courts, save Oklahoma, this doctrine has commanded adherence. *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108

S. W. (2) 509, 511; *Chattanooga & Tennessee Power Co.* v. *Lawson,* 139 Tenn. 354, 201 S. W. 165, 168, 170; *Evans* v. *Massman Construction Co.,* 243 Mo. 632, 122 S. W. (2) 924, 931; *Alabama Power Co.* v. *Smith,* 229 Ala. 105, 155 So. 601, 604. It was said in *Den* v. *Hoboken Land & Improvement Co., supra,* that an agent of the United States:

> "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government."

That the District Engineer may have been imprudent in directing the measures which brought the reservoir above elevation 750 at Wyandotte, with the resultant flooding of the basement of the school building through percolation, or may have erred in judgment, does not render petitioner responsible legally for having carried out the directions given. *Erskine* v. *Holnback,* 14 Wall. (U. S.) 613, 617, 20 L. Ed. 745, 747; *Stutsman County* v. *Wallace,* 142 U. S. 293, 309, 35 L. Ed. 1018, 1024; *Haffin* v. *Mason,* 15 Wall. (U. S.) 671, 675, 21 L. Ed. 196, 198; *Harding* v. *Woodcock,* 137 U. S. 43, 46, 47, 34 L. Ed. 589, 591; *Matthews* v. *Densmore,* 109 U. S. 216, 220, 27 L. Ed. 912, 913, 914; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 381, 77 L. Ed. 1265, 1271. Any other principle would make the agent the judge of the wisdom or propriety of the orders received; at his peril to obey or not, as he might decide the prudence of their conception and the desirability of their execution.

Petitioner did not serve its own interest in operating the reservoir in conformity with the District Engineer's instructions above elevation 745, for the flood control storage thereabove was "expressly reserved" for the control of floods which, as everyone knows, is designed to protect property and aid navigation downstream. The license (Article 13) forbade the use of the flood storage space for power generation, except as a mere incident to the holding or discharge of waters under the direction of the Secretary

of War. The case, in this aspect, is parallel to *Humpich's Trustees* v. *Louisville Gas & Electric Co., supra.*

The Oklahoma Supreme Court did not conclude that the directions of the District Engineer were beyond his authority to give as an officer of the United States, but, as indicated by the third head-note of its opinion, appears to have concluded that his instructions were authorized (R. 124). It should have sustained the plea of immunity set up by the exceptions to the appraisers' report (R. 15, 17) and reversed the judgment of the district court.

PROPOSITION II.

The acceptance of its Federal power license by petitioner, conditioned as it was regarding flood control operations, and the building of the dam as thereby authorized did not constitute a wrong because of which petitioner is liable herein.

While conceding that under *Yearsley* v. *W. A. Ross Construction Co., supra,* petitioner would not be liable "if the federal government had contracted with it to construct the dam or had employed it to operate the dam as a flood control project," the Supreme Court of Oklahoma concluded that in obligating itself to provide flood control storage, the petitioner "is liable to third parties exactly as though it had performed the acts of its own volition, which in legal effect it did, for it was not required to accept the provisions of the license and construct the dam" (R. 129). That the United States, through the Secretary of War, as authorized by the Act of June 28, 1938 (52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C.) did "utilize the service of" petitioner, through the medium of the petitioner's license for carrying out a National policy of flood-control is clear from what has been said and, therefore, under the Supreme Court of Oklahoma's own reasoning petitioner is within the immunity set

up. But, adverting to the purported distinction, inquiry should be made briefly into the soundness of the conclusion that by accepting the license and constructing its dam, petitioner became liable to respondent for damages suffered by flood control measures directed by the District Engineer. It seems patent that neither the acceptance of the license nor the construction of the dam had any causal connection whatever with respondent's injury. But, apart from this, did the taking of the license, without which the project could not be built as against the finding of the Federal Power Commission that its building "will affect the interests of interstate commerce" (R. 18; Act June 10, 1920, c. 285, Sec. 23, 41 Stat. 1075; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 210, 49 Stat. 846; Tit. 16, Sec. 817, U. S. C.) and the building of the dam authorized thereby constitute acts which ipso facto gave rise to liability to a party whose lands might be injured by subsequent flood control operations?

The petitioner was created as an "agency" of the State of Oklahoma for the purpose, among others, "to develop and generate water power and electric energy" on Grand River (Tit. 82, Chapt. 8, O. S. 1941) and was authorized to "make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it" (Tit. 82, Sec. 862n, O. S. 1941). The jurisdiction of the Federal Power Commission to grant the license has been upheld. *Grand River Dam Authority* v. *Going*, 29 F. S. 316, 325. The power to contract with the United States for funds with which to construct the project has been recognized by the Supreme Court of Oklahoma. *Wickham* v. *Grand River Dam Authority*, 189 Okl. 540, 118 P. (2) 640. The right of the petitioner to accept a license, without which the project authorized could not have been constructed lawfully, can scarcely be doubted, nor does the opinion of the Supreme Court of

Oklahoma in this case deny it. The acts done, to-wit, the acceptance of the license in order to carry out the purposes of petitioner's creation and the building of the dam, were obviously lawful acts lawfully performed. In themselves, they constituted no injury to respondent. Much less do they constitute an exemption from the immunity of which Mr. Justice Holmes said (*The Habana*, 189 U. S. 453, 465, 47 L. Ed. 900, 903):

> "* * * we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued."

It is not supposed that the United States, acting through an agent such as petitioner in a field of jurisdiction vouchsafed by the Constitution, acts wrongfully or that the agent employed is guilty of wrong in executing its directions. If private property be taken, a remedy is given in recognition of the Fifth Amendment, but the agent is not sueable. *Yearsley* v. *W. A. Ross Construction Co., supra* (309 U. S. p. 21).

PROPOSITION III.

Petitioner cannot be made liable by the law of Oklahoma for acts done in performing a Federal function.

The Supreme Court of Oklahoma said in the opinion herein:

> "* * * the defendant is a state agency, and its liability is fixed by the act under which it is created. 82 O. S. 1941, Sec. 862" (R. 129).

The part of the applicable Act referred to is:

> "Provided said District shall be liable for all damage caused by said District, its agents, servants and em-

ployees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged,'' etc. (Tit. 82, Sec. 862, O. S. 1941).

It is clear, we think, that no state may, by police regulation or otherwise, condition the carrying forward of flood control works by the United States. *State of Arizona* v. *State of California,* 283 U. S. 423, 451, 75 L. Ed. 1154, 1163, 1164. Too, a state may not lawfully impose a penalty against a carrier of the mails for failure to obtain a driver's license, when his competency to operate the vehicle had been determined, presumably, by the Post Office Department. *Johnson* v. *State of Maryland,* 254 U. S. 51, 56, 57, 65 L. Ed. 126, 128, 129. Likewise, a penalty may not be imposed by State law upon officers of the United States for performing their duties under Federal law. *State of Ohio* v. *Thomas,* 173 U. S. 276, 283, 43 L. Ed. 699, 701; *Cunningham* v. *Neagle,* 135 U. S. 1, 61, 62, 34 L. Ed. 55, 70, 71; *State of Tennessee* v. *Davis,* 100 U. S. 257, 263, 25 L. Ed. 648, 650; *Hunt* v. *United States,* 278 U. S. 96, 100, 73 L. Ed. 200, 201.

While agencies of the United States, for example, independent contractors engaged on construction of works for the Government, are not immune from regulation by the states (*James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 105, 84 L. Ed. 596, 603) which are non-discriminatory and do not operate directly upon the contract or the contractor's performance of it, the qualification is observed (Id., 309 U. S. 103) that,

> ''the authority of state laws or their administration may not interfere with the carrying out of a national purpose.''

In considering the taxing power of the states, either as to contractor's property or net income, the Supreme Court

of the United States has been careful to point out the distinction which exists between a levy which operates as a charge upon the contract itself and one which operates uniformly upon the contractor and other taxpayer of the state. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150, 82 L. Ed. 155, 166, 167.

That petitioner (although a public agency of the State of Oklahoma) is more nearly a Federal agent for flood control in the strict sense than a contractor constructing flood control or river improvement works is manifested by the fact that the upper ten feet of storage space in its reservoir was reserved by the license which it holds "expressly for the control of floods," and petitioner is that character of public agency whose services the Secretary of War has been authorized to "utilize" for that purpose.

Petitioner's services performed in carrying out its share of the National program are gratuitous. Its control of the reservoir is forbidden when elevation 745 is reached (R. 37). The storage space up to elevation of 750 was provided at its own cost (R. 37). In operation of the flood control pool, it may not and does not act voluntarily; it acts only "when, as and in the manner" directed by the District Engineer (R. 37). It is completely subservient to Federal control. It does not, as does the independent contractor, promise a given result with a choice of means to that end. Its every function in controlling floods when the pool stage reaches elevation 745 is subject to the direction of the Secretary of War.

The liability herein affirmed was the immediate product of petitioner's act performed in the capacity of a Federal agent. That liability, if sustainable, must be said to arise out of its acts performed in obedience to the voice of the United States. Consequently, it burdens its function as a flood control agent and makes it liable, perforce the Oklahoma Statute, when otherwise clearly it would not be.

The circumstance that petitioner is a public corporation of the State of Oklahoma does not alter the principle of immunity which it invokes.

The immateriality of the *character* of the instrument chosen by the United States to perform a National function with respect to its immunity from state control was forcibly stated by Chief Justice Marshall in *Osborne* v. *The Bank of the United States*, 9 Wheat. (U. S.) 738, 762, 763, 6 L. Ed. 204, 234, in the following language:

> "We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. * * * The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

So, the fact that the petitioner is a creature of the law of the State of Oklahoma does not mean that, while acting as a Federal agent and within its corporate powers, it is yet subject to be controlled, muleted or prevented by the laws of the State, or rendered liable for activities in its Federal character to penalties or liabilities imposed by State law which may render it either an impotent or unwilling agent.

The anomaly presented by the instant case is illustrated by the following: By the statute of Oklahoma to which the Supreme Court of Oklahoma has referred, petitioner is said to have become liable for having carried forward the directions of the representative of the Secretary of War in operating the reservoir for flood control purposes. Assume, then, that petitioner had refused to carry out such directions? By the provisions of Section 26 of the Federal

Power Act (Act June 10, 1920, c. 285, Sec. 26, 41 Stat. 1076; Tit. 16, Sec. 820, U. S. C.), its license would be subject to be revoked in an equity proceeding instituted by the Attorney General at the instance of either the Secretary of War or the Federal Power Commission and its project might be liquidated by decree. Thus, by yielding to the directions of the District Engineer, in the instant case, petitioner became liable under State law, as the Supreme Court of Oklahoma has said, whereas had it refused compliance, its business was liable to be wound up under Federal law.

As was said in *Southern Railway Co.* v. *Reed*, 222 U. S. 424, 442, 56 L. Ed. 257, 262, in which an interstate carrier was sought to be subjected to a penalty provided by state statute for refusing acceptance of a shipment before a rate had been fixed therefor, as required by Federal statute:

> "If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground."

Henry Ford & Son, Inc., v. *Little Falls Fibre Co.*, 280 U. S. 369, 378, 379, 74 L. Ed. 483, 488, 489, held a Federal Power licensee liable for the infringement of water rights of an upstream proprietor by the erection of flashboards upon a Government dam on a navigable stream permitted by its license. That case is not believed to bear upon the one at bar because the licensee there was carrying forward its own enterprise, in its own interest and for its own advantage and it was said that the Federal Power Act "does not purport to authorize a licensee of the commission to impair such rights recognized by state law without compensation." The mere grant of a Federal Power license does not, of itself, constitute the licensee a Federal agent,

Broad River Power Co. v. *Query*, 288 U. S. 178, 180, 181, 77 L. Ed. 685, 687, where it was said that the tax there complained of,

> "is not laid upon the license granted by the Federal Water Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit."

The distinguishing feature of the instant case is that the petitioner was acting for the United States and under its direction in furthering a National function in the regulation of interstate commerce; not to achieve a private objective of its own. Its immunity is clearly akin to the immunity which would have clothed officers of the War Department had they physically performed the act of which complaint is made. *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541. The distinction sought to be drawn by the Supreme Court of Oklahoma is not valid. Such was the conclusion of the court in *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604, where *Ford & Sons, Inc.*, v. *Little Falls Fibre Co., supra*, was considered in this connection.

PROPOSITION IV.

The Supreme Court of Oklahoma erroneouslyl decided that by placing itself in a position where, by complying with its license, petitioner committed the wrong complained of.

The Supreme Court of Oklahoma noted that petitioner had not acquired lands or flowage rights above elevation 750 in the reservoir area and that if, under the terms of the license, the District Engineer had a right to require the impounding of flood waters up to elevation 749.7, as he did, petitioner should have anticipated that possibility and should have acquired such lands and rights to whatever ele-

vation the back-water curve might reach, failing in which and by complying with the license "it committed the wrong to third parties here complained of" (R. 130). It is quite evident from the record that the waters which invaded respondent's basement and wrought the injury complained of did not flow over the surface of the school grounds and spill into the basement; they percolated through the loose soil underlying the surface of the school grounds (R. 50-51, 57, 78, 49, 62-63). The crest of the reservoir waters did not reach the building. Thus it is clear that had petitioner acquired flowage rights or lands up to approximately elevation 752 to accommodate the flowage of the back-water curve, the respondent's basement would have been flooded, precisely as happened. By Article 12 of petitioner's license (R. 37) it was required to secure "all necessary lands, easements, and rights-of-way up to elevation 750," except as to railroads, and by Article 13 (R. 37) it was provided that "the licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation." The critical point seems to have been whether elevation 750 applied at the dam or at any point on the reservoir. The former was the view of the District Engineer and the Federal Power Commission. That these Government authorities were possessed of the right to decide the issue is not challenged. The provisions of Articles 12 and 13 of the license, above noted, imply that the United States would be responsible for the acquisition of lands above elevation 750 and, correspondingly, responsible for any invasion or destruction thereof if required in the interest of flood control. Any error in judgment on the part of the District Engineer is not chargeable to petitioner, provided he had the power to judge, upon the principle heretofore noted. If petitioner responded to directions which the District Engineer was authorized to give, then it may not be sued.

Yearsley v. *Ross Construction Co., supra* (309 U. S. pp. 20, 21, 84 L. Ed., p. 557) and the decisions therein cited.

As was said in *Evans* v. *Massman Construction Co.*, 243 Mo. 632, 122 S. W. (2) 924, 931:

> "The government had a right to improve the river and the government had a right to hire somebody to do the work for it and any errors or mistakes made by the government in the plans or in the direction of the work to be done by defendant thereunder cannot afford a basis for plaintiff's recovery from the defendant."

The holding that compliance with the provisions of the license was a wrongful act on petitioner's part effectively strikes down those principles which shield the Government's agents and officers from personal responsibility when engaged in the performance of their official duties, within the scope of directions given them under authority of law. If the petitioner, as the tool of the Secretary of War, be liable, then why not the Secretary of War for the acts complained of were the result of directions given by the latter's authorized representative? The denial of the plea of immunity is not sustainable on such a basis. *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

PROPOSITION V.

Neither the Federal Power Act nor the provisions of Article 17 of petitioner's license create the liability asserted.

The Federal Power Act (Act June 10, 1920, c. 285, Sec. 10 (c), 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 203 (c), 49 Stat. 842; Tit. 16, Sec. 803 (c) provides in part:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project

works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Article 17 of the petitioner's license provides the same (R. 38).

Do these create a new liability, i. e., render petitioner liable for the injury to respondent resulting from obedience to the directions of the District Engineer? The Supreme Court of Oklahoma did not so hold and did not deny the soundness of the decisions denying that such a liability is thereby imposed. In *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604, the court squarely held that the provision of the Act above was not intended to create a liability but to provide for the assumption by the licensee of whatever liability that "may legally arise." Corresponding provisions of Federal Power licenses have been held to have been intended "for the sole purpose of protecting the United States," and that thereby the licensee assumes responsibility for "damages legally enforceable," as distinguished from creating a right of action in favor of third persons. *Louisville Hydro-Electric Co.* v. *Coburn*, 270 Ky. 631, 110 S. W. (2) 445, 448; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511. Similar provisions of a navigational license have been likewise construed. *Corrigan Transportation Co.* v. *Sanitary District* (D. C.), 125 F. 611, 613; Id. (C. C. A. 7), 137 F. 851, 855.

Prior to the Flood Control Act of June 22, 1936 (49 Stat. 1570), the control of floods on non-navigable waters as a matter of National policy was in an embryonic state and it may be doubted that Congress had in mind a case of this kind. *Humpich's Trustees* v. *Louisville Gas & Electric Co., supra* (108 S. W. (2), p. 511). A design to impose upon

a licensee a liability for damages for having carried out competent directions of the Secretary of War in a flood emergency, to protect navigation, would require most compelling language, for the principle is settled that the agent of the Government performing its functions is not liable for consequential injuries resulting (*Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 23, 94 L. Ed. 554, 558) no more than the United States (*Bedford* v. *United States*, 192 U. S. 217, 224, 225), while if the agent acts to "take" property within the contemplation of the Fifth Amendment to the Constitution of the United States, the Government impliedly promises compensation and has "afforded a remedy for its recovery by a suit in the Court of Claims." (*Yearsley* v. *Ross Construction Co., supra,* 309 U. S., p. 21, 84 L. Ed., p. 557). In either case the agent is not liable. It would be entirely out of harmony with a proper intent to conclude that the Federal Power Act means that a licensee should compensate a land owner for property "taken" by the direction of the United States and for its account in carrying out its flood control program, for which in law and morals the Government should pay. It is equally unreasonable to suppose that Congress intended that a licensee, when performing acts for the direct account of the United States, should be liable for consequential injuries to the property of another for which no legal liability could arise against the Government. Nowhere does it appear that a licensee, circumstanced as was petitioner, is to be made the insurer against loss to others produced by the acts of the Government and its authorized officers. It is believed that neither the Act nor the license were designed to impose any liability upon the licensee other than as such liability might be created by it upon its own responsibility; not for having done an act at the Government's command in carrying out a Federal function.

Conclusion.

It is concluded that the decision and judgment of the Supreme Court of Oklahoma should be reversed for the reasons above stated.

Respectfully submitted,

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